82-949

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH WAYNE FRICKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether instructing the jury in a criminal case that an accused is presumed to intend all the natural and probable consequences of an act knowingly done constitutes reversible error.

a. Whether the district court's burden-shifting instruction violates due process of law and is in conflict with this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

b. Whether the use of a presumptive instruction which shifts the burden to the Defendant to disprove an element of the offense, can constitute harmless error.

2. Whether the Court of Appeals erred in failing to reach the constitutionality of the federal regulation, as applied in this case, which required an accused citizen to detail in advance the content of the testimony of his own witness to the superior officer of his trial adversary, and obtain that officer's approval prior to calling the witness, in violation of due process of law flowing from the Fifth Amendment, and the Defendant's right to present witnesses, to compulsory process, and to effective assistance of counsel, guaranteed by the Sixth Amendment.

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The Petitioner, Kenneth Wayne Fricke, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 25, 1982.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as *United States v. Fricke*, No. 80-2215, slip op. at 4559 (5th Cir. August 25, 1982), and the opinion appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 25, 1982. A timely Suggestion for Rehearing En Banc was denied on October 4, 1982, and this Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following Rules and Statutes is set forth in Appendix C hereto.

Title 18, United States Code, § 241
Title 18, United States Code, § 242
Title 28, Code Of Federal Regulations, § 16.21, *et seq.*

STATEMENT OF THE CASE

The Petitioner, along with Co-Defendants Terry Baldwin and Angel Salcido, was indicted for conspiracy to violate the civil rights of one Larry Hintz, 18 U.S.C. § 241, and for violating the civil rights of said Larry Hintz, 18 U.S.C. § 242.

Jury trial commenced on July 21, 1980, before the United States District Court for the Southern District of Texas, the Honorable Woodrow Seals, presiding. On August 1, 1980, the jury returned a verdict finding Baldwin and Petitioner guilty on both counts. Salcido testified for the government and charges against him were dismissed. The court sentenced the Petitioner to ten years in prison on count one and to six months in prison on

count two, to run concurrently. Baldwin was given a probated sentence.

On May 22, 1981, the Petitioner filed his appellate brief with the United States Court of Appeals for the Fifth Circuit, (Docket No. 80-2215), and on January 27, 1982, the case was orally argued before a panel consisting of the Honorable John Brown, the Honorable Thomas Gee, and the Honorable William Garwood.

Relying on *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and *United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979), Fricke contended on appeal that the trial court erred in instructing the jury that a person is presumed to intend all the natural and probable consequences of an act knowingly done, thereby violating due process of law in that the government was relieved of the burden to prove the specific intent element of the offenses charged. The Fifth Circuit found that the instruction was harmless error beyond a reasonable doubt. *United States v. Fricke*, No. 80-2215, slip op. at 4563 (5th Cir. Aug. 25, 1982).

The Petitioner argued that this instruction told the jury to presume, rather than infer, the requisite intent. In the case at bar, the trial court gave a mandatory instruction followed by a curative instruction on burden of proof. (R. XIII, 47)[1] The Fifth Circuit concluded that it was plain from the evidence that Fricke had the requisite specific intent, and that other portions of the charge rendered it unlikely that the jury was significantly affected by the word "presumed." *United States v. Fricke, supra,*

1. Because the record is not consecutively numbered, citations to the record include volume and page number.

at 4563. However, the Petitioner urged that after the curative instruction was given, the trial court applied that presumption to the facts, telling the jury they could conclude that the Petitioner acted in both counts with the specific intent to violate the law as alleged upon a finding by them that the Petitioner knew what he was doing and intended to do what he was doing. (R. XIII, 47) Thus, the Petitioner complained that he could be convicted upon a showing by the government that he knew he struck the complainant and intended to strike him, without any further showing that he intended to violate 18 U.S.C. § 241 and 18 U.S.C. § 242, that is to conspire to violate and to violate the civil rights of the complainant. Therefore, the vice of a mandatory presumption was aptly illustrated; a citizen could be presumed guilty of a greater offense, and the government was relieved of its burden of proof.

The Fifth Circuit stated that:

> In *Chiantese* we refused to adopt a *per se* rule of reversal for these types of charges. However, we also stated that when a charge included this sort of coercive or burden-shifting language we would not uphold it by harmonizing the erroneous instruction with curative statements or phrases contained elsewhere in the charge. Rather, we held that we would weigh the possible harm of the instruction in the context of each case. We do not believe *Sandstrom* warrants any change in this analysis.

United States v. Fricke, supra, at 4562.

Fricke also contended on appeal that the trial court denied him the right to call witnesses in his defense by refusing to require Assistant United States Attorney Carl Walker, Jr. to testify without having first received per-

mission from the Attorney General. The trial court found that Fricke had failed to comply with certain federal regulations, 28 C.F.R. §§ 16.21 - 16.26, which require the prior approval of the Attorney General or an appropriate Justice Department official before a Justice Department employee may disclose information obtained as a part of the performance of official duties. The Fifth Circuit failed to reach the constitutionality of these regulations as applied in this case. The Fifth Circuit in discussing the exclusion of the desired testimony concluded that: "[t]he desired testimony was indecisive, nonexculpatory, and concerned an occurrence long *after* the beating. Given this, and that Fricke made absolutely no effort to comply with the regulations, and did not seek a recess or continuance to have more time to do so, we find that no reversible error occurred." *United States v. Fricke, supra,* at 4568 (emphasis supplied).

One issue in question was the location of the Petitioner on a certain date at a certain time. The defense contended that the Petitioner had not been where the prosecution claimed he had been, but instead was testifying as a government witness before a federal grand jury at that time (R. X, 112, 114). In order to establish this, a subpoena was issued to the Assistant United States Attorney handling the grand jury that day (R. XI, 34). The Government objected to the calling of Assistant United States Attorney Walker as a witness, as well as to the subpoenas of two other Department of Justice employees who were to serve solely as character witnesses, because the defense had not complied with the affidavit requirement of 28 C.F.R. § 16.23(c). The trial court sustained the objection, and the witnesses were not called (R. XI, 36-37).

The contested point on appeal was whether an internally-generated administrative regulation of one adversary in a criminal proceeding outweighed the constitutional guarantees a citizen-accused has to due process of law, flowing from the Fifth Amendment, and compulsory process and effective assistance of counsel derived from the Sixth Amendment.

The Petitioner relied on *United States v. Feeney*, 501 F. Supp. 1337, 1342 (D. Colo. 1980) in which the United States District Court held that "since the Government which prosecutes an accused has the duty also to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . ."

The Fifth Circuit concluded that since the desired testimony, in their opinion, was not exculpatory, and that the Petitioner made no effort to comply with the regulations, and did not seek more time to do so, no reversible error occurred.

On August 25, 1982, the Panel delivered its opinion affirming the conviction. Because of the lack of clarity of the law in the Fifth Circuit dealing with burden-shifting jury instructions on intent, and the great importance of the question dealing with the non-statutory requirement that the Attorney General approve the appearance of a Department of Justice employee subpoenaed by a defendant, after notice of the content of the proposed testimony, the Petitioner respectfully suggested that the En Banc Court of Appeals rehear the appeal on these two issues. The Suggestion for Rehearing En Banc was denied on October 4, 1982. See Appendix B.

REASONS FOR GRANTING CERTIORARI

I. THE DISTRICT COURT'S INSTRUCTING THE JURY THAT AN ACCUSED IS PRESUMED TO INTEND ALL THE NATURAL AND PROBABLE CONSEQUENCES OF AN ACT KNOWINGLY DONE VIOLATED DUE PROCESS OF LAW IN THAT THE GOVERNMENT WAS RELIEVED OF THE BURDEN TO PROVE THE SPECIFIC INTENT ELEMENT OF THE OFFENSES CHARGED, IS IN CONFLICT WITH THIS COURT'S DECISION IN *SANDSTROM v. MONTANA*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), AND CANNOT CONSTITUTE HARMLESS ERROR.

A. The District Court's Instruction Violates Due Process Of Law And Is In Conflict With This Court's Decision In *Sandstrom v. Montana, supra.*

In *Sandstrom v. Montana, supra,* this Court was faced, in a criminal action, with the question whether the jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," in a case in which intent is an element of the crime charged, violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. *Sandstrom,* 442 U.S. at 512. In reversing the conviction because of the charge given by the trial court, this Court clearly recognized that a conclusive presumption or an instruction which has the effect of shifting the burden of persuasion to the Defendant deprives the defendant of due process of law.

The District Court in the instant case instructed the jury as follows:

> I charge you that a person ordinarily is presumed to intend all the natural and probable consequences of an act knowingly done. The burden of proof as to each element of the offense remains, however, with the government.
>
> If you find that the defendants knew what they were doing and that they intended to do what they were doing and if you find that what they did constituted a deprivation of a constitutional right, then you may conclude that the defendants acted with the specific intent to deprive the victim of that constitutional right.

(R. XIII, 47).

The District Court's instruction is similar to the instruction struck down in *Sandstrom*. This Court held in *Sandstrom* that the jury could easily have viewed an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" as mandatory. 442 U.S. at 517. This Court recognized that there was a risk that the jury, once having found Sandstrom's act voluntary, would interpret the instruction as directing a finding of intent. "[A] reasonable jury could well have interpreted the presumption as 'conclusive', that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption." *Id.*

Alternatively, this Court found that the jury may have interpreted the instruction as one shifting the burden of persuasion to the defendant to disprove the element of intent. This Court concluded that either interpretation had the effect of relieving the State of the burden of proof on the critical question of Sandstrom's state of mind.

The Fifth Circuit also recognized in the case at bar, that even if the jury did not treat the presumption as conclusive, the instruction may have had the effect of shifting the burden to the Petitioner to show that he did not have the specific intent. *United States v. Fricke, supra.* at 4562, n. 2. The Court of Appeals also recognized that the curative instruction in the present case may not have eliminated all error in the use of 'presumed'. *Id.*

This Court held in *Sandstrom*:

> [T]he fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.

442 U.S. at 519.

In determining the constitutionality of these kinds of presumptions, this Court used the line of reasoning set forth in *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This Court ruled in *Winship* that due process requires proof beyond a reasonable doubt of every fact necessary to prove the crime with which the accused is charged.

If the Court of Appeals was not sure whether all error from the use of the presumptive instruction was eliminated in this case, how may the instruction be upheld, when the standard in a criminal case requires proof beyond a reasonable doubt?

The element of specific intent had to be established by the prosecution beyond a reasonable doubt and it is respectfully submitted that the Court of Appeals was in error, when, at page 4563 of the slip opinion it stated, "[S]pecific intent was not a critical question in the case." Shifting the burden of proof, by the use of this instruction, influenced the jury decision and eliminated the mandatory requirement of proof beyond a reasonable doubt on *each* and *every* element. In addition, the burden on the prosecution was not lessened because the Petitioner presented no conflicting evidence, since the "not guilty" plea put every element in issue, each requiring proof beyond a reasonable doubt. Thus, the Court of Appeals, after recognizing the requirement of proving the element of specific intent, erred when it stated at page 4563: "This burden is much easier though when the defendant presents no conflicting evidence on the issue." The fundamental nature of the constitutional problem is not waived because the Defendant's counsel failed to object to the prohibited instruction.

Therefore, the Petitioner in this case was denied due process of law since the Government was relieved of the burden to prove beyond a reasonable doubt every fact that was necessary to constitute the crime with which the Petitioner was charged.

B. The District Court's Use Of A Presumptive Instruction Which Shifts The Burden To The Defendant To Disprove An Element Of The Offense Cannot Constitute Harmless Error.

This Court held in *Sandstrom* that an instruction which constitutes either a burden-shifting presumption or a con-

clusive presumption deprives the defendant of his right to due process of law and therefore is unconstitutional. This Court, however, declined to reach whether the question of an unconstitutional jury instruction on an element of the crime is reversible error in every case.

The State's argument in *Sandstrom*, that the instruction constituted harmless error, and the Petitioner's reply, that an unconstitutional jury instruction on an element of the crime can never constitute harmless error, had not been considered by the Supreme Court of Montana. Therefore, this Court left that issue for the Montana Court to consider on remand.

The Petitioner respectfully invites this Court to address the question of whether a presumptive instruction in a criminal case, which shifts the burden of proof to the Defendant to disprove an element necessary to prove the crime, is such a denial of due process that it can never result in harmless error.

The opinion of the Court of Appeals in the case at bar recognized the problem of the use of instructions which shift the burden of proof to the Defendant. "Once more, however, we urge trial courts to avoid the use of presumptive language in instructions." *Fricke, supra*, at 4563, n.3. The Court of Appeals also recognized in this case that their *en banc* solution to presumptive charges in *United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979), had not been entirely successful since courts continue to give questionable instructions. However, the Court of Appeals stated in deciding this case that they had refused to adopt a *per se* rule of re-

versal for these type of charges in *Chiantese*, but instead would weigh the possible harm of the instruction in the context of each case.

The constitutional implications require that, if the appellate court is to affirm the case below, it must be able to find that whatever the error, it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Mason v. Balkcom*, 669 F.2d 222 (5th Cir. 1982).

In determining whether the instruction was harmless beyond a reasonable doubt, the Court of Appeals decided that specific intent was not a critical question in this case. "Under these circumstances, if a jury concluded that a beating took place, it would undoubtedly encompass a finding that the defendant had the requisite intent. The jury's verdict necessarily reflects that a beating took place, and that it occurred while Hintz was in custody. It is plain that Fricke had the requisite specific intent." *Fricke, supra* at 4563.

Thus, here the Petitioner could be convicted upon a showing by the government that he knew he struck Hintz and intended to strike him, without any further showing that he intended to violate 18 U.S.C. § 241 and 18 U.S.C. § 242, that is to conspire to violate and to violate the civil rights of Hintz. The vice of a mandatory presumption is thereby illustrated: upon evidence sufficient perhaps to show assault, a citizen can be presumed guilty of a greater offense. The government is relieved of proving its case beyond reasonable doubt. The Petitioner contends that under these circumstances, specific intent was a crucial question in the case.

The Petitioner further submits that a presumptive instruction, which shifts the burden to the defendant to disprove a necessary element of the offense in a criminal case, subjects the defendant to irreparable harm which cannot be remedied by determining the constitutionality of the instruction on a case-by-case analysis. "*[T]he trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act . . . A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense . . . [T]his presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*" *Sandstrom*, 442 U.S. at 522, (emphasis in original), citing to *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

This case shows the danger of weighing the possible harm of the instruction by the context of each case by allowing the appellate court to presume the very same thing that the instruction presumes: that the specific intent was proved by merely proving the act. It also allows the appellate court to decide whether an element of the offense is a "crucial question" in the case. As stated in *Sandstrom*, the presumption of innocence extends to *every* element of the offense.

More significantly, this type of analysis requires the appellate court to determine the effect such instruction had on the jury. As this Court recognized in *Sandstrom*:

> [E]ven if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they

> *did* do. As the jury's verdict was a general one, . . . we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside".

Sandstrom, 442 U.S. at 526, (emphasis in original).

This Court has permitted a shift in the burden of proof only with respect to factors that do not constitute elements of the crime charged. In *Jacks v. Duckworth*, 651 F.2d 480 (7th Cir. 1981), the Honorable Judge Swygert pointed out in his dissenting opinion the difference between an instruction which shifts the burden to the defendant to disprove an element necessary to prove the crime charged and an instruction that shifts the burden of proof only with respect to factors that do not constitute elements of the crime charged. Judge Swygert distinguished this Court's opinions in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) and *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) from the opinion in *Sandstrom v. Montana, supra*. In *Patterson v. New York, supra*, the defendant was required to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the crime from murder to manslaughter. Because the State had proved the necessary elements of murder, this Court held in *Patterson* that due process did not require it to prove the absence of the affirmative defense. In *Leland v. Oregon, supra*, this Court held that Oregon could shift the burden of proof on the insanity defense so long as the State had already proved

beyond a reasonable doubt every element of the crime, including premeditation and deliberation.

The distinction, as noted by Judge Swygert in *Jacks v. Duckworth, supra,* between these cases and *Sandstrom* is that in *Sandstrom* this Court held the instruction unconstitutional because it shifted the burden of proof on intent, an essential *element* of the crime charged. The instruction given in the case at bar suffers from the same infirmity, in that it shifted the burden of proof on intent.

Since intent is one of the elements of the crimes for which the Petitioner was convicted, the Court of Appeals erred in upholding a jury charge that required the Petitioner to disprove one of the elements of the crime charged. The jury charge violated the direction set out by the *en banc* Court of Appeals for the Fifth Circuit in 1977 in *Chiantese, supra,* that: "1) No district court shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence . . . 2) The error in giving such a burden-shifting charge will not be absolved because other phrases defining the proper burden of proof are included in the instructions, no matter how often such corrective phrases are repeated. *This Court no longer will harmonize inconsistent charges to effect the cure* of a charge in violation of paragraph one." 560 F.2d at 1255 (emphasis added).

Therefore, the Petitioner suggests that this Court adopt a rule that would bar the submission of these instructions in every case, to ensure that courts will refrain from using an instruction which is conclusive or which has the effect of shifting the burden to the defendant to disprove an element of the crime charged.

II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FAILING TO REACH THE CONSTITUTIONALITY OF THE FEDERAL REGULATION, AS APPLIED IN THIS CASE, WHICH REQUIRED AN ACCUSED CITIZEN TO DETAIL IN ADVANCE THE CONTENT OF THE TESTIMONY OF HIS OWN WITNESS TO THE SUPERIOR OFFICER OF HIS TRIAL ADVERSARY, AND OBTAIN THAT OFFICER'S APPROVAL PRIOR TO CALLING THE WITNESS, IN VIOLATION OF DUE PROCESS OF LAW FLOWING FROM THE FIFTH AMENDMENT, AND THE DEFENDANT'S RIGHT TO PRESENT WITNESSES, TO COMPULSORY PROCESS, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY THE SIXTH AMENDMENT.

This Petition for Certiorari presents a point of error which calls for this Court's attention to determine an important question never before addressed by this Court.

One issue in question was the location of the Petitioner on a certain date at a certain time. The defense contended that the Petitioner had not been at a cover-up meeting as the prosecution claimed he had been, but instead was testifying as a government witness before a federal grand jury at that time. In order to establish this, a subpoena was issued to the Assistant United States Attorney handling the grand jury that day. The trial court sustained the Government's objection to the calling of Assistant United States Attorney Walker as a witness, because the defense had not complied with the affidavit requirement of 28 C.F.R. § 16.23(c).

The Fifth Circuit declined to reach the constitutionality of these regulations as applied in this case. Nor did it

decide whether the trial court properly determined that the regulations applied to the information sought by the Petitioner. The Court of Appeals concluded that "[t]he desired testimony was indecisive, nonexculpatory, and concerned an occurrence long *after* the beating." *Fricke, supra,* at 4568 (emphasis in original). The Court continued, "Fricke made absolutely no effort to comply with the regulations, and did not seek a recess or continuance to have more time to do so, we find that no reversible error occurred." *Id.*

The Petitioner respectfully suggests that the Court of Appeals did not observe the reason the Petitioner needed to call this witness: the presentation of testimony by the witness Walker was essential to attacking the credibility of the adverse witnesses.

The Court of Appeals' conclusion that Walker's testimony was immaterial is a jury question which should have been decided by jurors after hearing the relevant testimony of the witness. Had the jury had an opportunity to hear the testimony, they may have believed the Petitioner had been subpoenaed before the grand jury, and therefore that a key prosecution witness was lying when he testified that the Petitioner was at a cover-up meeting in a different city on the date in question.

A citizen accused of crime in this country has a right to compulsory process to secure the attendance of any witnesses in his behalf. *U.S. Const.* Amend. VI. This right to present a defense has been held by this Court to be a fundamental element of due process of law. *Washington v. Texas,* 338 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

The Court of Appeals emphasized that the Defendant made no attempt to comply with the provisions of 28

C.F.R. § 16.22, which requires the prior permission of the appropriate Department official or the Attorney General before a Department of Justice employee may disclose information acquired as part of the performance of his official duties. That is correct. He intentionally chose not to do so. That is not the issue in this case. The contested point is whether an internally-generated administrative regulation of one adversary in a criminal proceeding outweighs the constitutional guarantees a citizen-accused has to due process of law, flowing from the Fifth Amendment, and compulsory process and effective assistance of counsel, derived from the Sixth Amendment.

First, in the case at bar, no information within the meaning of "acquired as a part of the performance of his official duties" was requested of the witness Walker. His potential testimony that the Petitioner indeed did testify before the grand jury on a certain date, and at a certain location, would in no way jeopardize any confidential information or hinder the performance of the United States Attorney's office in the execution of its legitimate function. Therefore, it was error to refuse to honor the subpoena issued to the witness Walker to compel his testimony.

Second, assuming *arguendo* that such information *was* gained in the performance of Walker's duties, the balancing test between administrative regulations and constitutional safeguards in the Bill of Rights must result in affording the protection of the Constitution to the accused. How can the government, an adversary in a criminal trial, unilaterally require the Defendant to inform him in advance of the requested testimony, much less seek the

adversary's permission to challenge or destroy the government's case?

The only cases discovered on this issue are from the Tenth Circuit. A case directly on the issue that traces the development of what little law exists in relation to 28 C.F.R. § 16.21 *et seq.* is *United States v. Feeney*, 501 F. Supp. 1337 (D. Colo. 1980). The Chief Judge of the United States District Court for the District of Colorado, the Hon. Fred M. Winner, reached the conclusion that the case often cited by Justice Department lawyers as a *carte blanche* endorsement of 28 C.F.R. § 16.21, *et seq.*, *Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951) really never reached the legality of the order. Judge Winner was faced with a motion for new trial in a criminal case, where the Department of Justice had relied on 28 C.F.R. § 16.21 *et seq.* to prevent the testimony by the Assistant Attorney General of the United States, an Assistant United States Attorney, and an investigator in his office, regarding certain tape recordings held by the Government. He traced the law from *Touhy* through *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), a civil case where a claim of privilege was made by the Secretary of the Air Force, to *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), where the President of the United States claimed executive privilege.

Judge Winner quoted the following passage from *Reynolds, supra*:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The

> rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

501 F. Supp. at 1344.

He then concluded that, among others, the following procedures would be followed:

1. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing, the privilege is designed to protect.
   United States v. Reynolds, supra.

2. To uphold privilege claims, it must appear that there is risk of disclosure of state or military secrets or that the interests of justice demand confidentiality.
   United States v. Reynolds, supra.

3. Upon demand of the government, some sort of an in camera hearing should be structured.
   United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

4. The ultimate decision as to a right of secrecy is for the court and not for the executive branch.
   United States v. Reynolds, supra, and *United States v. Nixon, supra.*

Id. at 1347.

He then denied the motion to quash, ordered the appearances of all three witnesses, and set a hearing to take testimony in open court, or, at the request of the Government, *in camera.*

After the Government filed a petition for writ of mandamus to compel the District Court to vacate its order, the United States Court of Appeals for the Tenth Circuit agreed with Judge Winner that the Government had not met the requirements of the law enforcement evidentiary privilege, and denied the writ. *United States v. Winner,* 641 F.2d 825, 832 (10th Cir. 1981). The Court of Appeals went on to approve a compromise agreement wherein the Assistant United States Attorney and the Investigator would testify *in camera* with the defendant and defense counsel present. *Id.* at 832-33.

Public policy, fundamental fairness, and the supervisory function of this Court all call for establishing the rule that 28 C.F.R. § 16.21 *et seq.* cannot override a criminal defendant's constitutional right to compulsory process, to assistance by counsel free to try his case without the hamstringing requirement to telegraph his case to his opponent, and to a fair trial conducted within the parameters of due process of law. The Court of Appeals' refusal to reach this issue calls for this Court to grant a Petition for Certiorari to address this question of first impression.

Furthermore, it is asserted that this issue is one of constitutional dimension, and that the Court of Appeals erred for the further reason that there is no holding that the error was harmless beyond a reasonable doubt, as required by *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *See United States v. Fricke, supra.*

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit by mailing 4 copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Kenneth Wayne FRICKE
Defendant-Appellant.

No. 80-2215

UNITED STATES COURT OF APPEALS
Fifth Circuit

Aug. 25, 1982.

Defendant was convicted in the United States District Court for the Southern District of Texas, at Houston, Woodrow B. Seals, J., of violating civil rights, and he appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) instruction containing word "presumed" was harmless beyond a reasonable doubt; (2) there was no substantial government interference with defendant's right to call witnesses by telling witnesses during trial that they were subject to ongoing grand jury investigation; (3) trial court handled in an acceptable fashion the matter of witnesses' invocation of Fifth Amendment privilege, and properly held that witnesses had valid Fifth Amendment claims extending to all relevant questions; and (4) jury argument by Government did not infringe defendant's right not to testify.

Affirmed.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, GEE and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

Early on the morning of February 25, 1979, appellant Kenneth Wayne Fricke, a narcotics agent with the Texas Department of Public Safety ("DPS"), severely beat Larry Michael Hintz. The incident grew out of an altercation between the two at a dance hall called the Watering Hole, in Wallis, Texas. Fricke and two other DPS officers, all of whom were apparently off duty following a plain clothes investigation at another location earlier in the evening, were patrons of the hall on the night in question. After a confrontation, Fricke was struck by Hintz, who fell down near a bar. Terry Joe Baldwin, a Wallis, Texas police officer, arrested the intoxicated Hintz and took him out of the dance hall, where another Wallis officer, Angel Salcido, handcuffed Hintz and placed him in a patrol car. Fricke followed Baldwin and Hintz out of the hall, and, after talking with Baldwin, told one of the other DPS officers, John Janicek, that he planned to "see what he [Hintz] was made of." Janicek asked if this was a good idea because of the "federal government." Fricke replied that Baldwin had said it was all right. Fricke then got in the car and directed Baldwin to a remote area where, in the presence of Salcido and Baldwin, Fricke proceeded to brutally beat Hintz. Afterward, Fricke told Janicek that he had "tagged" Hintz. The government also introduced evidence of an attempted cover-up of the incident.

Fricke, Baldwin, and Salcido were charged with both conspiring to violate, and violating Hintz's civil rights under 18 U.S.C. §§ 241 and 242.[1] Salcido's case was later severed and he testified as a government witness against Fricke and Baldwin. Both were convicted. Fricke appeals.

Fricke asserts five errors in his trial. Finding that they do not present reversible error, singly or collectively, we affirm his conviction. Preliminarily, we note that the evidence against Fricke was extremely strong, and was virtually uncontroverted in any of its essentials.

I.

Fricke's first alleged error presents a familiar problem. The trial court instructed the jury as follows:

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1. Section 241 states:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

Section 242 states:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

"With regard to specific intent, you are instructed that intent is a state of mind and can be proven by circumstantial evidence. Indeed, it can rarely be established by any other means. In determining whether this element of specific intent was present, you may consider all the attendant circumstances of the case.

"I charge you that *a person ordinarily is presumed to intend all the natural and probable consequences of an act knowingly done.* The burden of proof as to each element of the offense remains, however, with the Government.

"If you find that the defendants knew what they were doing and that they intended to do what they were doing, and if you find that what they did constituted a deprivation of a constitutional right, then you may conclude that the defendants acted with the specific intent to deprive the victim of that constitutional right." (Emphasis added.)

[1, 2] Fricke argues that this charge acted as a conclusive presumption and thereby relieved the government of its burden of proof on one of the elements of the crime. Obviously, our en banc attempted solution in this thorny area, *United States v. Chiantese,* 560 F.2d 1244 (5th Cir. 1977), *cert. denied,* 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979), has not been entirely successful. Courts continue to give questionable instructions. *See, e.g., United States v. Sutton,* 636 F.2d 96, 97-98 (5th Cir. 1981). The Supreme Court has also addressed, and condemned, instructions containing conclusive presumptions. *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Clearly, we are not writing on a clean slate.

In *Chiantese* we refused to adopt a *per se* rule of reversal for these types of charges. However, we also stated

that when a charge included this sort of coercive or burden-shifting language we would not uphold it by harmonizing the erroneous instruction with curative statements or phrases contained elsewhere in the charge. Rather, we held that we would weigh the possible harm of the instruction in the context of each case. We do not believe *Sandstrom* warrants any change in this analysis.[2]

We begin by noting that Fricke's able and vigorous counsel failed to object to the instruction. Because the error at least approaches constitutional stature, we will assume we must determine whether it was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1976); *Mason*

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2. Before beginning the analysis, we note that here the instruction is somewhat qualified. While the improper word "presumed" is used, the expression "*the law* presumes," with its especially coercive connotations, is not employed. The instruction states that "a person *ordinarily* is presumed to intend all the natural and probable consequences of an act knowingly done." However, even if we assume that a jury would not treat the presumption as conclusive, it at least may have the effect of shifting the burden to the defendant to show that this is not an ordinary situation. Both *Sandstrom* and *Chiantese* condemn these types of instructions as well. In the two sentences following the "presumed" language, the jury was instructed that the burden of proof on each element remained with the government, and, in effect, that a finding of specific intent was permissive ("you *may* conclude"), rather than mandatory. The court also charged the jury that "the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence, and no adverse inferences may be drawn from the failure to do so." We do not suggest that these portions of the instructions eliminated all error in the use of "presumed." *See United States v. Chiantese,* 560 F.2d at 1255; *cf. United States v. McRae,* 593 F.2d 700, 704-05 (5th Cir.), *cert. denied,* 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979) (instructions did not use "presume"). However, these ameliorative portions of the charge, and the qualified nature of the questioned instruction, are relevant, along with the other circumstances of the case, to our assessment of whether the error was clearly harmless.

v. Balkcom, 669 F.2d 222 (5th Cir. 1982). We do, however, regard the defendants' failure to object as significant. It supports a determination that specific intent was not a critical question in the case. Of course, since specific intent is an element of the crime, the prosecution must still establish its existence beyond a reasonable doubt. This burden is much easier though when the defendant presents no conflicting evidence on the issue. Fricke's defense was that no beating took place. The testimony, however, indicated that Fricke planned to strike Hintz, that Baldwin knew of this, and that Fricke did indeed beat Hintz while, as Fricke plainly knew, Hintz was intoxicated, handcuffed, and in police custody; and that the beating was made possible by the cooperation of the arresting officers, which Fricke had solicited for this purpose. Under these circumstances, if a jury concluded that a beating took place, it would undoubtedly encompass a finding that the defendant had the requisite intent. The jury's verdict necessarily reflects that a beating took place, and that it occurred while Hintz was in custody. It is plain that Fricke had the requisite specific intent. Moreover, the proof of Fricke's guilt was nearly overwhelming, and other portions of the charge render it unlikely that the jury was significantly affected by the word "presumed." The first error is rejected. The instruction was harmless beyond a reasonable doubt.[3]

II.

Fricke's second alleged error concerns three witnesses subpoenaed by the defense, who invoked their fifth amend-

3. Once more, however, we urge trial courts to avoid the use of presumptive language in instructions. *See United States v. Chiantese*, 560 F.2d at 1255-56 (suggesting proper intent instructions).

ment privileges and refused to testify. Fricke claims the government violated his right to due process and to compulsory process by telling these witnesses, during trial, that they were the subject of an ongoing grand jury investigation into the cover-up of the beating.

[3, 4] "Substantial government interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant." *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980). Such interference is not present in this case. The government did not inform the witnesses that they would become grand jury targets if they testified. Rather, they were *already* targets of an ongoing grand jury investigation.[4] In fact, the whole matter surfaced when one of the witnesses, Wallis Chief of Police Lee White, presented the court with a motion stating that he planned to invoke the fifth amendment. One of the other witnesses, Officer Johnny Perez of Sealy, was also planning to invoke the fifth, although he was not sure to what extent. Only Officer J. W. Johnson of Bellville was unaware that he was a target of the grand jury. In a proceeding to determine how to handle White's assertion of the fifth amendment, Fricke's counsel advised the court that, though he might change his mind, he did not anticipate calling Johnson,[5] and that Johnson had stated he had not retained counsel and was not sure whether he was going to claim the fifth amendment. The government attorney informed the court,

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4. It is true that the investigation was of recent origin. But this was caused by Salcido's decision to testify. His information convinced the government that the three witnesses might have tried to both cover up the beating and frustrate the investigation.

5. Counsel had also earlier advised the court, "I do not think at this time I will use [Johnson]."

in the presence of defense counsel, that Johnson was also a target. The court then informed Johnson and advised him to retain an attorney. The following day the court held another conference to determine the validity and scope of the witnesses' fifth amendment claims. And, as noted below, the government stipulated to the substance of what the defense apparently wanted to establish by Johnson's testimony. Under these circumstances, we refuse to find "substantial government interference" with the defendant's right to call witnesses.

[5-7] Fricke has not shown that the government's investigation of these people was unjustified, nor that it was prompted by the possibility that they might testify for the defense. A defendant's sixth amendment rights do not override the fifth amendment rights of others. *United States v. Lacouture*, 495 F.2d 1237 (5th Cir.), *cert. denied*, 419 U.S. 1053, 95 S.Ct. 631, 42 L.Ed.2d 648 (1974). Neither can a defendant compel the government to grant use immunity to witnesses he desires to call. *See, e.g., United States v. Chagra*, 669 F.2d 241, 258-61 (5th Cir. 1982). Given this, we do not feel that a defendant's rights are violated when the government merely informs witnesses that they are targets of an investigation, as long as the investigation was not prompted by the possibility of the witnesses testifying, *cf. United States v. Hammond*, 598 F.2d 1008, 1012-14 (5th Cir. 1979), and the government does not harass or threaten the witnesses, *see United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976).[6]

6. The effect of accepting Fricke's argument would be to ensure that defendants receive the testimony of witnesses who are blissfully ignorant of their potential criminal liabilities. We doubt that many such witnesses exist, especially with valid fifth amendment rights, and we refuse to condemn the government if it effectively prevents these lambs from being led to slaughter. This is not to say that we

III.

[8, 9] Fricke presents another alleged error relating to the three witnesses discussed above. His claim here has two components. In determining the scope and validity of the fifth amendment claims of witnesses White, Perez, and Johnson, the trial judge held a hearing out of the presence of the jury. Defense counsel, and counsel for the potential witnesses, were furnished copies of the respective witness' grand jury testimony. The trial judge elicited what questions the defense planned to ask each witness, and then, in a general way, inquired whether the witnesses would assert the fifth amendment and on what basis. The judge next excluded the Assistant United States Attorney and the defendants and their counsel, and made a slightly more specific inquiry of each individual witness concerning his fifth amendment claim, with only the witness' counsel present. The court ruled that any relevant question could have a tendency to incriminate these witnesses. Since each planned to assert the fifth, the court would not allow the defense to call the witnesses to the stand.[7] The

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whole-heartedly accept the government's assertions of the pristine nature of its motivations. The government does not usually follow about those it is investigating, reminding them of their fifth amendment rights. We simply hold that we find no governmental threat or other misconduct under the circumstances of this case.

7. We have held that once the trial judge has correctly determined that a witness' claim of the privilege against self-incrimination protects the witness from being required to testify respecting the entire subject matter about which defense counsel desires to interrogate the witness, the defense has no right to put the witness on the stand merely to enable the jury to observe the witness claim the privilege. *United States v Melchor Moreno*, 536 F.2d 1042, 1046 n. 4 (5th Cir. 1976); *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975); *United States v. Lacouture*, 495 F.2d at 1240.

court sealed the record of this inquiry. *See United States v. Goodwin*, 625 F.2d at 702 (suggesting this approach).

Fricke asserts that excluding his lawyer from part of this proceeding violated his rights to due process, compulsory process, and effective assistance of counsel. In conjunction with this, because he has not had access to the sealed record, Fricke also urges this Court to carefully evaluate the trial court's determination of the scope and validity of the witnesses' fifth amendment claims. We have done so.

This is an extremely complex area, with tensions existing between the rights of witnesses, the rights of defendants, and the policy against closed judicial proceedings. *See United States v. Melchor Moreno*, 536 F.2d 1042, 1047-48 n. 7 (5th Cir. 1976). We feel the trial court handled the matter in an acceptable fashion under the circumstances. In *Melchor Moreno* we noted that the complexity of the subject matter may make suitable the participation of defense counsel in an *in camera* inquiry. *Id.* But a significant portion of the reasoning behind this possibility is the desire to prevent overburdening the trial judge. In this case, the trial court had the benefit of the views of defense and government counsel in the initial portion of the in-chambers hearing. The subject matter was not so complex that additional help from defense counsel was necessary. Further, Fricke has not cited any cases indicating that a defendant can examine a witness in open court to determine the legitimacy of his fifth amendment claim. We see no reason for a different result when the inquiry is made *in camera*. *See id.* at 1048 n. 7. It is for the judge to determine the validity of fifth amendment claims. Subjecting a witness to an examination by a partisan party might effectively destroy the privilege.

Nevertheless, we do not hold that it is always proper to exclude defense counsel from these *in camera* hearings. Even if his participation is primarily passive, counsel's presence can be important in preserving, or preventing, an error by the court. However, a reciprocity problem is present. The value of an *in camera* inquiry is that it allows the court to probe the witness' fifth amendment claim more deeply than it could in open court. A witness' rights are threatened if this is done in the presence of the government's attorney. Yet, if the court allows defense counsel to remain present, fairness suggests that the government's interests be represented as well. We need not resolve this issue here. The record does not indicate that Fricke's counsel at any time expressed a desire to remain present during the inquiry or *ever* objected to the inquiry being conducted in his or Fricke's absence. In fact, it suggests that he led the court to believe that he was in agreement with the procedure followed.[8] Under these circumstances, we find no error in the trial court's procedure.

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8. The first potential witness examined by the court was Perez. At the initial proceedings in the presence of all parties and counsel, counsel for defendants stated what they expected to ask Perez and establish by his testimony, and the court by questioning Perez ascertained that he would claim his fifth amendment privilege because he felt his answers might incriminate him. This was substantiated by Perez's lawyer. Counsel for Baldwin, Fricke's co-defendant, then stated: "Excuse me, if I may make a suggestion. . . . I have no objection to leaving your office at this time with my client to let the Court inquire privately with Mr. Perez and his attorney and that portion of the record sealed. I have no objections to that." Fricke's counsel said nothing. The court did not immediately respond, but very shortly thereafter stated its intention to examine Perez in the presence only of his counsel, and to seal the record. The court then said, "So, *if nobody has any objections* to that proceedings [*sic*], I now excuse everyone except Mr. Perez and his attorney, Mr. Szekely." (Emphasis added.) The only response of Fricke's counsel was, "Your Honor, may I leave my briefcase?"

[10] We also find that the trial court's holding that the witnesses had valid fifth amendment claims extending to all relevant questions was proper. In reviewing this decision, we are diffident because of the trial court's proximity to and familiarity with the case. *United States v. Melchor Moreno,* 536 F.2d at 1050. Of course, the trial court's discretion is not unlimited. *Id.* In this case, the court determined that the "slippery nature" of the potential charges—conspiracy and obstruction of justice —made all relevant questions potentially incriminating of these witnesses.

The witnesses' attorneys all argued that simply placing the witnesses at certain scenes could be incriminating. This is certainly true of witnesses White and Perez. White may have been involved in what the government asserts was a meeting to plan the cover-up of the beating. Perez's involvement was even more immediate. His testimony might have placed him at a cafe with Fricke immediately after the beating, and would also have disclosed Perez's role in cleaning up Hintz before Baldwin and Salcido transported him to jail in Bellville, Texas. Thus, the questions Fricke desired to ask these witnesses could easily have produced incriminating testimony. Johnson's fiifth amendment claim is less clear, but given that Fricke's counsel was ambivalent about whether he would call Johnson, and that the government stipulated that Johnson directed Baldwin and Salcido to the Bellville Hospital, which is the testimony Fricke apparently desired, we do not feel that Fricke was harmed by the court's not allowing Johnson to be called. Further, each of these witnesses had testified before the grand jury, and it appeared, as the witnesses' counsel all urged, that the testimony which the defense expected to elicit

from them would at least partially conflict with their grand jury testimony, exposing them to charges of perjury.

[11] We emphasize that a court must not accept, without inquiry, witnesses' blanket fifth amendment assertions. Here, the judge did not do so. He determined what questions the defendant wanted to ask and why the witnesses' claims extended to these questions. He did not err in concluding that the witnesses should not be called. *See United States v. Lacouture, supra.*

IV.

Fricke's next alleged error is that the following jury argument by the government infringed his fifth amendment right not to testify:

> "In fact, did you notice when Mr. Phillips was arguing to you, not one time did he talk about what happened when that patrol car left the Watering Hole and turned left on FM 1093, not one time. He talked about what happened inside the Watering Hole, and he talked about what happened —I think he wanted to talk about what happened in Mason's Corner Cafe, even though he kept calling it the Watering Hole. I think he meant Mason's Corner when they were sitting around having coffee. He just skipped the whole part that is the subject matter of this indictment, the whole reason we are here. *Now, he asked you to find Mr. Fricke not guilty, but not once, not once in this trial have they claimed innocence.*" (Emphasis added.)

[12] We must determine if these remarks were "manifestly intended or of such character that a jury would

naturally take them to be a comment on the failure of the accused to testify." *United States v. Walker,* 559 F.2d 365, 369 (5th Cir. 1977). The government argues that the prosecutor was referring to Fricke's trial counsel, Mr. Phillips. Appellant counters by noting that the comment is in the plural, and refers to the "entire trial," not just final argument.

[13] The statement was made after the respective lawyers for Fricke and Baldwin had each presented closing arguments. Therefore, it is certainly plausible that the "they" the prosecutor was referring to were the co-defendants' lawyers. Further, the context of the comment was an attack on defense counsel's closing argument, which emphasized inconsistencies in the testimony, but did not concentrate on Fricke's innocence. This posture was consistent with Fricke's defense strategy throughout the trial. Therefore, while it is a close question, we do not feel that the prosecution "manifestly intended" to comment on Fricke's failure to testify. The second prong of our inquiry—whether the jury would naturally consider the statement as a comment on Fricke's silence—strengthens our conviction that this is a proper conclusion. Fricke's counsel objected to the statement, and the trial judge immediately responded that the comment was directed toward Phillips' jury argument, was not a comment on the defendants' failure to testify, that defendants did not have to testify, and that he would so charge the jury.[9] Given this spontaneous interpretation by the trial judge, we hold that the jury would not naturally consider the statement as a comment on Fricke's failure to testify.

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9. In his final instructions the court carefully instructed the jury that the law did not require defendants to testify and that "no inference of any kind may be drawn, from the failure of the defendants to testify."

No reversible error is presented. *United States v. Walker*, 559 F.2d at 369.

V.

[14] Fricke's final alleged error concerns the trial court's refusal to allow him to call Assistant United States Attorney Carl Walker to the stand. The court found that Fricke had failed to comply with certain federal regulations, 28 C.F.R. §§ 16.21-16.26, which require the prior approval of the Attorney General or an appropriate Justice Department official before a Justice Department employee may disclose information obtained as a part of the performance of official duties.

We decline to reach the constitutionality of these regulations as applied in this case. Nor do we base a decision on whether the trial court properly determined that the regulations applied to the information sought by Fricke. Fricke desired Walker to testify regarding whether Fricke appeared before a grand jury at a certain time. Another witness claimed Fricke was at a meeting on that day and that the beating was discussed then. However, Fricke's counsel, after talking with Walker, stated to the court that Walker had informed him that he did not remember where Fricke was on the date in question. The prosecutor stated that this was her understanding of Walker's memory as well. The desired testimony was indecisive, nonexculpatory, and concerned an occurrence long *after* the beating. Given this, and that Fricke made absolutely no effort to comply with the regulations, and did not seek a recess or continuance to have more time to do so, we find that no reversible error occurred.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-2215

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH WAYNE FRICKE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 08/25/82, 5 Cir., 198__, ____F.2d____).

(OCTOBER 4, 1982)

Before BROWN, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

/s/ WILL GARWOOD
United States Circuit Judge

APPENDIX C

CHAPTER 13. CIVIL RIGHTS

§ 241. *Conspiracy against rights of citizens*

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

(June 25, 1948, ch. 645, § 1, 62 Stat. 696; Apr. 11, 1968, P.L. 90-284, Title I, § 103(a), 82 Stat. 75.)

§ 242. *Deprivation of rights under color of law*

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not

more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

(June 25, 1948, ch 645, § 1, 62 Stat. 696; Apr. 11, 1968, P.L. 90-284, Title I, § 103(b), 82 Stat. 75.)

CHAPTER 1. DEPARTMENT OF JUSTICE

Subpart B—*Production or Disclosure in Response to Subpenas or Demands of Courts or Other Authorities*

Source: Order No. 501-73, 38 FR 1741, Jan. 18, 1973, unless otherwise noted.

§ 16.21 *Purpose and scope.*

(a) This subpart sets forth the procedures to be followed when a subpena, order, or other demand (hereinafter referred to a "demand") of a court or other authority is issued for the production or disclosure of (1) any material contained in the files of the Department, (2) any information relating to material contained in the files of the Department, or (3) any information or material acquired by any person while such person was an employee of the Department as a part of the performance of his official duties or because of his official status.

(b) For purposes of this subpart, the term "employee of the Department" includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of, the Attorney General of the United States, including U.S. attorneys, U.S. marshals, and members of the staffs of those officials.

§ 16.22 *Production or disclosure prohibited unless approved by appropriate Department official.*

No employee or former employee of the Department of Justice shall, in response to a demand of a court or other authority, produce any material contained in the files of the Department or disclose any information relating to material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the appropriate Department official or the Attorney General in accordance with § 16.24.

§ 16.23 *Procedure in the event of a demand for production or disclosure.*

(a) Whenever a demand is made upon an employee or former employee of the Department for the production of material or the disclosure of information described in § 16.21(a), he shall immediately notify the U.S. attorney for the district where the issuing authority is located. The U.S. attorney shall immediately request instructions from the appropriate Department official, as designated in paragraph (b) of this section.

(b) The Department officials authorized to approve production or disclosure under this subpart are:

(1) In the event that the case or other matter which gave rise to the demanded material or information is or, if closed, was within the cognizance of a division of the Department, the Assistant Attorney General in charge of that division. This authority may be redelegated to Deputy Assistant Attorneys General. The Assistant Attorney Gen-

eral of the Criminal Division may redelegate this authority to the Director of the Office of Legal Support Services.

(2) In instances of demands that are not covered by paragraph (b)(1) of this section:

(i) The Director of the Federal Bureau of Investigation, if the demand is one made on an employee or former employee of that Bureau for information or if the demand calls for the production of material from the files of that Bureau.

(ii) The Director of the Bureau of Prisons, if the demand is one made on an employee or former employee of that Bureau for information or if the demand calls for the production of material from the files of that Bureau.

(iii) The Commissioner of the Immigration and Naturalization Service, if the demand is one made on an employee or former employee of the Service for information or if the demand calls for the production of material from the files of the Service.

(iv) The Administrator of the Law Enforcement Assistance Administration, if the demand is one made on an employee or former employee of the Administration for information or if the demand calls for the production of material from the files of the Administration.

(v) The Chairman of the United States Parole Commission, if the demand is one made on an employee or former employee of the Commission for information or if the demand calls for the production of material from the files of the Commission and

(vi) The Director of the United States Marshals Service, if the demand is one made on an employee or former employee of the Service for information or if the

demand calls for the production of material from the files of the Service.

(3) In instances of demands that are not covered by paragraph (b)(1) or (2) of this section, the Deputy Attorney General.

(c) If oral testimony is sought by the demand, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or his attorney, setting forth a summary of the testimony desired, must be furnished for submission by the U.S. Attorney to the appropriate Department official.

[Order No. 501-73, 38 FR 1741, Jan. 18, 1973, as amended by Order No. 503-73, 38 FR 4952, Feb. 23, 1973; Order No. 650-76, 41 FR 20163, May 17, 1976; Order No. 690-77, 42 FR 10846, Feb. 24, 1977; Order No. 780-78, 43 FR 19849, May 9, 1978; Order No. 871-80, 45 FR 5301, Jan. 31, 1980]

§ 16.24 *Final action by the appropriate Department official or the Attorney General.*

(a) If the appropriate Department official, as designated in § 16.23(b), approves a demand for the production of material or disclosure of information, he shall so notify the U.S. attorney and such other persons as circumstances may warrant.

(b) If the appropriate Department official, as designated in § 16.23(b), decides not to approve a demand for the production of material or disclosure of information, he shall immediately refer the demand to the Deputy Attorney General for decision. Upon such referral, the Deputy Attorney General shall make the final decision

and give notice thereof to the U.S. attorney and such other persons as circumstances may warrant.

[Order No. 501-73, 38 FR 1741, Jan. 18, 1973, as amended by Order No. 693-77, 42 FR 12045, Mar. 2, 1977]

§ 16.25 *Procedure where a Department decision concerning a demand is not made prior to the time a response to the demand is required.*

If response to the demand is required before the instructions from the appropriate Department official or the Attorney General are received, the U.S. attorney or other Department attorney designated for the purpose shall appear with the employee or former employee of the Department upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate Department official and shall respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

§ 16.26 *Procedure in the event of an adverse ruling.*

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 16.25 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to produce the material or disclose the information sought, in accordance with § 16.24 the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand. "United States ex rel Touhy v. Ragen," 340 U.S. 462.

APPENDIX TO SUBPART B—*Redelegation of Authority to Deputy Assistant Attorney General for Litigation, Antitrust Division, To Authorize Production or Disclosure of Material or Information*

1. By virtue of the authority vested in me by § 16.23 (b)(1) of Title 28 of the Code of Federal Regulations, the authority delegated to me by that Section to authorize the production of material and disclosure of information described in § 16.21(a) of that Title is hereby redelegated to the Deputy Assistant Attorney General for Litigation of the Antitrust Division and to the Director of the Office of Legal Support Services: *Provided however,* That if in his judgment unusual circumstances exist which warrant special consideration, the Director of Legal Support Services shall consult with a Deputy Assistant Attorney General prior to approving production of material or disclosure of information.

2. This directive is effective October 15, 1979.

[44 FR 59904, Oct. 17, 1979, as amended at 45 FR 5301, Jan. 23, 1980]

No. 82-949

In the Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH WAYNE FRICKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of violating 18 U.S.C. 241 (conspiracy against rights of citizens) and 18 U.S.C. 242 (deprivation of rights under color of law). He was sentenced to 10 years' imprisonment for violating Section 241 and six months' imprisonment for violating Section 242, the sentences to be served concurrently. Petitioner contends that the district court incorrectly instructed the jury on the issue of criminal intent and improperly refused to allow him to call an Assistant United States Attorney as a witness on his behalf.

1. On February 25, 1979, petitioner, a narcotics agent with the Texas Department of Public Safety, severely beat Larry Michael Hintz. The beating occurred after an altercation between petitioner and Hintz at a dance hall in Wallis, Texas. Following Hintz's arrest at the dance hall, petitioner

and Wallis police officers Terry Joe Baldwin and Angel Salcido took Hintz in a patrol car to a remote area where petitioner brutally beat him. Hintz was handcuffed and intoxicated throughout the beating. The government also introduced evidence of an attempted cover-up of the incident (Pet. App. A-2, A-6).

Petitioner, Baldwin, and Salcido were charged with conspiring to violate Hintz's civil rights and with violating those rights. Subsequently Salcido's case was severed from that of the other defendants and he testified against them at trial. Petitioner and Baldwin were both convicted, and petitioner appealed (Pet. App. A-3).

The court of appeals affirmed (Pet. App. A-1 to A-15). It characterized the evidence against petitioner as "extremely strong, and * * * virtually uncontroverted in any of its essentials" (*id.* at A-3). It then ruled (*id.* at A-3 to A-6) that the district court's instruction that "a person ordinarily is presumed to intend all the natural and probable consequences of an act knowingly done," if error (*id.* at A-5 n.2), was harmless beyond a reasonable doubt. The court also held (*id.* at A-15) that the district court had not erred in refusing to allow petitioner to call an Assistant United States Attorney as a witness.[1]

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[1]The court of appeals further ruled that the government had not interfered with petitioner's right to call witnesses by informing the witnesses, during trial, that they were the subject of a grand jury investigation into the cover-up of the beating (Pet. App. A-6 to A-8); that the district court had not erred in excluding petitioner's counsel from an in camera inquiry into the validity of the witnesses' Fifth Amendment claims (*id.* at A-9 to A-11); that the district court had correctly concluded that the witnesses had valid Fifth Amendment claims extending to all questions relevant to the beating and cover-up (*id.* at A-12 to A-13); and that the prosecutor had not improperly commented on petitioner's failure to testify (*id.* at A-13 to A-15). Petitioner does not seek review of those rulings.

2. In instructing the jury on the element of specific intent, the district court charged, inter alia, that "a person ordinarily is presumed to intend all the natural and probable consequences of an act knowingly done" (Pet. App. A-4). Although his counsel did not object to this instruction at the time it was given (*id.* at A-5), petitioner now contends (Pet. 7-10) that the instruction runs afoul of this Court's decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). There is no merit to this claim.

a. In *Sandstrom*, a "deliberate homicide" case, the Court condemned the instruction, given over the defendant's objection, that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Court found the instruction improper because a reasonable jury could have interpreted the presumption either "as 'conclusive,' that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption" or "as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless *the defendant* proved the contrary * * *" (442 U.S. at 517; emphasis in original). Either interpretation, the Court held, had the impermissible effect of relieving the State of the burden of proving that the defendant had acted with the requisite criminal intent. *Id.* at 521-524.

Unlike the charge invalidated in *Sandstrom* (442 U.S. at 514-515; *id.* at 527 (Rehnquist, J., concurring)), the instruction petitioner challenges here could not reasonably have been interpreted as creating a mandatory presumption. The jury was told only that a person "*ordinarily*" is presumed to intend the natural and probable consequences of his acts (Pet. App. A-4; emphasis by the court of appeals).[2] At the

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[2]As the court of appeals noted (Pet. App. A-5 n.2; emphasis in original), "the expression '*the law* presumes,' with its especially coercive connotations, [was] not employed."

same time, the jurors were instructed that if they found that petitioner knew what he was doing and intended to do what he did, they "*may* conclude" that he acted with the requisite specific intent (Pet. App. A-4; emphasis added). They were also informed that they were entitled to consider all of the attendant circumstances in determining whether petitioner acted with specific intent (*ibid.*). In these circumstances, a reasonable juror could not have construed the court's instruction as a directive to find that petitioner acted with specific intent. In addition, immediately following the "ordinarily is presumed" language, the jury was specifically instructed that the burden of proving each element of the offense remained with the government (*ibid.*). In light of this explicit statement, no reasonable juror could have interpreted the court's charge as shifting the burden of persuasion to petitioner. Since the instruction in this case "allowed but did not require the jury to draw conclusions about [petitioner's] intent from his actions" (*Sandstrom, supra,* 442 U.S. at 514), it was proper. See *id.* at 527 (Rehnquist, J., concurring); see also *id.* at 514-515.[3]

b. Even if the instruction was improper, the court of appeals correctly held (Pet. App. A-5 to A-6) that the error was harmless beyond a reasonable doubt. The court noted (*id.* at A-6) that the government's evidence showed that petitioner transported Hintz to a remote area for the purpose of beating him, asked other officers to help him, and

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[3]In any event, no timely objection was made to this instruction, as is required by Fed. R. Crim. P. 30 ("[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection"). Accordingly, in the absence of plain error, the court of appeals correctly affirmed the judgment of the district court. See *Singer* v. *United States,* 380 U.S. 24, 38 (1965).

beat Hintz severely while Hintz was handcuffed and intoxicated. *Ibid.* Petitioner's only defense was that no beating took place. *Ibid.* As the court of appeals correctly observed (*ibid.*), "[u]nder these circumstances, if a jury concluded that a beating took place, it would undoubtedly encompass a finding that [petitioner] had the requisite intent." Accordingly, any error in the district court's charge was harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18 (1967).[4]

3. Petitioner also contends (Pet. 16-21) that the district court erred in sustaining the government's objection to his calling Assistant United States Attorney Carl Walker as a witness. Petitioner asserts (*id.* at 16-17) that his purpose in calling Walker was to have him testify that petitioner had been testifying as a government witness before a federal grand jury at a time when, according to a government witness in this case, petitioner was attending a meeting at which a cover-up of the beating was discussed. The district court ruled that Walker was not required to testify because

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[4]Petitioner suggests (Pet. 10-15) that this Court grant the petition in order to adopt a rule that a presumptive instruction concerning an essential element of a criminal offense can never constitute harmless error. This suggestion should be rejected. Where, as here, the government's evidence in support of an essential element of the offense is "extremely strong" and "virtually uncontroverted" (Pet. App. A-3), an error in the trial judge's instructions concerning that element should not automatically lead to reversal. Cf. *Glasser* v. *United States*, 315 U.S. 60, 67 (1942). The instruction condemned in *Sandstrom* does not violate a constitutional right so basic to a fair trial — such as the right to counsel or an impartial judge — that it can never be considered harmless error. See *Chapman* v. *California*, *supra*, 386 U.S. at 23 & n.8. As the Fifth Circuit held in *United States* v. *Chiantese*, 560 F.2d 1244, 1255 (1977) (en banc), cert. denied, 441 U.S. 922 (1979), instructions of the kind invalidated in *Sandstrom* are not "the type of error which will automatically produce reversal"; rather, "the weighing of its harm to the accused [is] a judicial matter to be resolved in the context of each case where it occurs."

petitioner had not complied with Department of Justice regulations, 28 C.F.R. 16.21 *et seq.*, requiring the prior approval of the Attorney General or an appropriate Justice Department official before a Department employee may disclose information obtained in the performance of his official duties (Pet. App. A-15).

The court of appeals affirmed on a different ground (Pet. App. A-15). It noted (*ibid.*) that counsel for petitioner as well as government counsel had represented to the trial court that Walker had stated that he did not remember where petitioner was at the time in question. It therefore concluded that "[t]he desired testimony was indecisive, non-exculpatory, and concerned an occurrence long *after* the beating" (*ibid.*; emphasis in original).[5] The court of appeals correctly held that there was nothing improper in the district court's refusal to permit petitioner to call Walker as a witness.[6]

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[5]Contrary to petitioner's suggestion (Pet. 17), the fact that Walker could not remember where petitioner was at the crucial time renders his testimony of no value not only in actually establishing petitioner's whereabouts at that time, but also in impeaching the government witness who testified that petitioner was at a cover-up meeting at the time in question.

[6]Petitioner urges the Court (Pet. 21) to grant the petition in order to determine the constitutionality of the Department of Justice regulations upon which the district court based its decision. In view of the court of appeals' affirmance of the district court's ruling on an alternative ground that itself does not warrant review by this Court, the petition should not be granted to consider this constitutional question. Cf. *Ashwander* v. *TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring). Moreover, even petitioner's own authority contemplates a defendant's compliance with the procedures required by the regulations and the government's subsequent refusal to provide testimony as predicates to a constitutional challenge. See *United States* v. *Feeney*, 501 F. Supp. 1337, 1340 (D. Colo. 1980), remanded, *United States* v. *Winner*, 641 F.2d 825 (10th Cir. 1981); see also *United States* v. *Allen*, 554 F.2d 398, 406-407 (10th Cir. 1977). Petitioner has cited no authority for his

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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claim (Pet. 18) that requiring him to comply with the regulations as a prerequisite for the government's testimony violates his constitutional rights. In any event, the regulations are a proper exercise of the Attorney General's authority. See *Touhy* v. *Ragen*, 340 U.S. 462 (1951); *United States* v. *Allen*, *supra*, 554 F.2d at 406-407.

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